

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:)	Docket No. 98-SIT-5
)	
Calpine Corporation and Bechtel)	COMMITTEE PROPOSED DECISION
Enterprises, Inc. (Delta Energy Center))	RE: NOI EXEMPTION
Petition for Jurisdictional)	
Determination)	
_____)	

I. THE PROJECT

Calpine Corporation and Bechtel Enterprises, Inc. (Delta Energy Center, LLC or Petitioner) propose to construct and operate an 880 to 950 megawatt (MW) natural gas-fired combined cycle powerplant that is a market-based response to the creation of the California Power Exchange (PX). The proposed project will be located in Contra Costa County in the city of Pittsburg on a 20-acre site owned by Dow Chemical and leased to Petitioner. The Delta Energy Center will sell up to 18 MW of electricity to Dow, and the balance of the project's output will be sold through the PX, in the bilateral power sales market to several electric utilities and power marketers, and in the Western Systems Power Pool.

II. PROCEDURAL HISTORY

On September 17, 1998, Petitioner filed a "Petition for Jurisdictional Determination" requesting that the Commission find the Delta Energy Center powerplant project eligible for an exemption from the Notice of Intention (NOI) requirements of Public Resources Code (PRC) section 25502. Petitioner asserts that its project conforms with the provisions of PRC, § 25540.6(a)(1) which exempts certain powerplant projects from the NOI process.

By Notice dated October 19, 1998, the Energy Facility Siting Committee scheduled a hearing on November 10, 1998 to consider the Petition. In accord with Commission regulations,¹ the Committee served the Notice and Petition upon the individuals, organizations, and businesses identified by Petitioner as "interested parties," as well as upon other persons and entities appearing on other pertinent mailing lists. The Notice directed all entities wishing to participate in the proceeding to file written statements by November 5, 1998. The Notice also directed Petitioner to provide responses to several inquiries regarding its assertion that the proposed project qualifies for an NOI exemption. Petitioner timely filed its responses as sworn testimony. Commission Staff also filed a statement pursuant to the Notice. No other comments were filed.

On November 4, 1998, the Commission declared certain findings in the *Blythe Energy* Decision as precedential for NOI exemption proceedings.² In that Decision, the Commission also indicated that Petitions for NOI exemptions may be reviewed on the basis of sworn testimony in lieu of evidentiary hearings. Consequently, on November 10, 1998, the Committee issued a Notice canceling the November 10th evidentiary hearing on this Petition, and rescheduled the hearing before the full Commission at its Business Meeting on December 2, 1998.

On November 24, 1998, the Committee issued this Proposed Decision which is based on the sworn testimony filed by Petitioner, as well as the statement submitted by Staff. The Proposed Decision was served on Petitioner and all interested parties for review and comment prior to the Commission's December 2nd hearing on the matter.

III. APPLICABLE LAW

A. Statutory Requirements.

Public Resources Code section 25502 provides in pertinent part that:

¹ Cal. Code of Regs., tit. 20, § 1232.

² Docket No. 98-SIT-2; CEC Publication No. P800-98-004.

Each person proposing to construct a thermal powerplant ...shall submit to the commission a notice of intention [NOI] to file an application for the certification of the site and related facility or facilities.³

The purpose of the NOI is to provide an open planning process in which the project proponent, interested agencies, and members of the public have an opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for a proposed project. (Cal. Code of Regs., tit. 20, § 1721). The NOI process also reviews whether a proposed project conforms with the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, § 25502).

Successful completion of the NOI process is a prerequisite to the second stage of powerplant licensing, i.e., the Application for Certification (AFC). Public Resources Code section 25540.6, however, *exempts* certain projects from the NOI process and allows them to proceed directly to the AFC stage.⁴ Projects eligible for this expedited licensing process include:

...a thermal powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... . (PRC, § 25540.6(a)(1).)⁵

Petitioner contends its proposed project fits within this provision.

B. Policy Guidance.

The Commission has authority to interpret pertinent statutory or regulatory provisions. Typically, such Commission policy is expressed in its biennial Electricity Report (*ER*), the most recently

³ The Commission generally has 12 months from the time an NOI filing is accepted in which to conduct this review. (PRC, § 25516.6(a).)

⁴ The AFC process anticipates a *final* licensing decision within 12 months of filing an application. See, PRC, § 25540.6(a).

⁵ PRC, § 25540.6 lists several specific NOI exemptions that include: cogeneration, solar, modification of a specific facility, less than 100 MW, and demonstration projects.

adopted of which is controlling for powerplant proposals filed during an *ER*'s operative life. (PRC, §§ 25309 and 25523(f)). In the present instance, this guidance appears as part of the 1996 *ER* in which the Commission stated:

For gas-fired powerplants which are the result of competitive solicitations or negotiations, we will continue our process [announced in the Addendum to *ER 94*] for granting exemptions from NOI requirements to such projects. (*ER 96*, p. 75, Endnote 1).

The policy expressed in *ER 94* and the Addendum to *ER 94* supported the development of a competitive market in the production and sales of electricity. The Addendum clarified Commission policy on legislation amending Section 25540.6 to allow NOI exemptions for natural gas-fired projects that are "the result of a competitive solicitation or negotiation." (AB 1884; Statutes of 1993).⁶ In the Addendum, the Commission expressed its preference for a "...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'."⁷ In *ER 96*, the Commission expanded the views contained in *ER 94* and the *ER 94* Addendum to encourage the development of merchant powerplants that participate in the newly emerging electricity marketplace without the benefit of ratepayer guarantees. (*ER 96* at pp. 71-72). Until the *Blythe Energy* Decision was issued, formal Commission policy on NOI exemptions was limited to these Electricity Reports.⁸

⁶ The Legislative Counsel's Digest for AB 1884 states that the amendments were intended to change the statute to conform to the present-day competitive marketplace of energy development. "...[T]he siting provisions of the Act were written at a time when large baseload powerplants were the types of plants being considered by the Commission and when competition between utilities and second party power producers was nonexistent." (Leg. Counsel's Digest, Bill Analysis for AB 1884, Third Reading, April 12, 1993). At the time AB 1884 was adopted, the federal Public Utilities Regulatory Policy Act (PURPA) and other related state laws had established a process (Biennial Plan Report Update or BRPU) to allow regulated public utilities and independent power producers to compete in the marketplace through a competitive bid process in order to meet demand. (*Ibid.*; 8/27/93 Senate Analysis).

⁷ *ER 94* Addendum, Revision 1, p. 2.

⁸ See, *Blythe Energy*, pp. 3-6 for a more complete discussion of the NOI exemption policies contained in *ER 94* and *ER 96*.

C. Precedential Decision

In *Blythe Energy*, the Commission further interpreted the scope of its policies pertaining to NOI exemptions, and determined that a natural gas-fired merchant project which proposes to sell its power in the competitive electricity market, and does not put ratepayers at risk, would generally be eligible for an NOI exemption. The Commission declared the following Findings as *Precedent*:⁹

- 1) The Commission adopted an "Addendum to the 1994 Electricity Report" on February 14, 1996.
- 2) This Addendum sets forth policies and procedures which apply to the interpretation of Public Resources Code (PRC) section 25540.6(a)(1) and are, on a case-by-case basis, specifically applicable to individual Petitions seeking an exemption from the Notice of Intention (NOI) provisions of PRC, § 25502.
- 3) The Commission adopted the 1996 Electricity Report (*ER*) which continued the policies set forth in *ER 94* and in the Addendum.
- 4) The California Power Exchange (PX) was created by AB 1890 to provide an efficient "competitive auction" open to all power producers, resulting in competitive market pricing at no risk to ratepayers. (Pub. Util. Code, § 355).
- 5) The creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations, which are of the type reasonably envisioned by the policy expressed in the Addendum and PRC, § 25540.6(a)(1).
- 6) The PX market, which began the competitive auction on March 31 1998, replaced the solicitation process that existed under the Biennial Report Plan Update (BRPU).

In addition, the Commission found that power sales to the PX are the "result of a competitive solicitation or negotiation for new generation resources" within the meaning of PRC, § 25540.6(a)(1).¹⁰ This finding includes natural gas-fired projects that sell power to other power exchanges and/or wholesale, and/or retail marketers, and/or direct access power markets, and/or other power consumers.¹¹

⁹ *Blythe Energy*, pp. 18-19.

¹⁰ Commission Order adopting *Blythe Energy* (Order No. 98-1104-04); see also, *Blythe Energy*, pp. 17-18.

¹¹ *Ibid.*

IV. EVIDENCE OF RECORD

The *Blythe Energy* Decision provides that a Petitioner may establish eligibility for an NOI exemption by filing sworn testimony in response to certain specific inquiries enumerated in that Decision.¹² In consideration of the issues raised in the instant Petition, the Committee directed Petitioner to respond to those inquiries as follows:¹³

1. Does Petitioner contend that the PX process constitutes a “competitive solicitation or negotiation?” If so, on what basis?
2. Provide evidence to establish that Petitioner’s prospective project is “the *result* of a competitive solicitation or negotiation.”
3. Describe the specific nexus between the particular project proposed by Petitioner and the PX’s solicitations for “day ahead” and “hourly bids.” How is the proposed project anticipated to perform under both scenarios?
4. Is it Petitioner’s position that its proposal to develop a merchant powerplant to sell energy through the PX creates an irrebuttable presumption that such proposal is the “result of a competitive solicitation or negotiation?”
5. Is Petitioner negotiating with any other potential power purchasers or power exchanges?
6. What is Petitioner’s registration status at the PX? If Petitioner has not begun the registration process, what are Petitioner’s plans regarding registration and negotiation for a “PX Participation Agreement?”
7. Identify Petitioner’s principal corporate owners and/or other entities or individuals who are legally and financially responsible for the development, construction, and operation of the proposed project.
8. Describe Petitioner’s experience and assets with regard to power generation acquisition, and powerplant development, ownership, and operation.

¹² *Id.*, fn. 27 at p. 18.

¹³ See, October 19, 1998, Notice of Committee Hearing.

9. Describe the specific location where the project will be constructed, and describe Petitioner's site selection criteria that led to this particular site location.
10. Provide evidence describing the project components sufficiently to establish that the proposed facility is a natural gas-fired powerplant.
11. Provide evidence to establish that the proposed project can be developed and operated without the benefit of ratepayer support or guarantees.
12. Explain how Petitioner's negotiations will be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner. Petitioner responded to the inquiries in its November 5, 1998, statement to the Committee. The responses were executed under penalty of perjury by Lynn Kerby, Senior Vice President of Calpine Corporation. Under *Blythe Energy*, responses that reflect the Commission's policy with regard to inquiries 1, 2, and 4 do not require further consideration. Regarding the remaining inquiries, the Committee reviewed the sworn responses as submitted by Petitioner in lieu of an evidentiary hearing, and based its Findings and Conclusions upon the evidence contained in that submittal.

Staff. Staff agreed with Petitioner's assertions that its proposed natural gas-fired powerplant is the "result of a competitive solicitation or negotiation" based on its prospective participation in the PX. (Staff Statement filed November 3, 1998). Staff noted that in addition to its proposal to sell power through the PX, Petitioner is also engaged in negotiations to market its power in other power exchanges and in the bilateral power sales market. In previous NOI exemption cases, the Commission found that letters of interest to purchase electricity produced by a merchant project constitute sufficient evidence of negotiations between Petitioners and power marketers to establish eligibility for an NOI exemption.¹⁴ Staff recommended, therefore, that the Committee grant the instant Petition since the evidence of record is consistent with existing Commission policy and previous NOI exemption cases.¹⁵

¹⁴ See, e.g., *High Desert* (Docket No. 97-SIT-1); *Sunlaw* (Docket No. 97-SIT-3).

¹⁵ In addition to *Blythe Energy*, Staff refers to the Commission's Decision in *La Paloma* and cases cited therein.

There were no other comments or other evidence filed in this matter.

V. FINDINGS and CONCLUSIONS

Based upon the precedent established in *Blythe Energy*, and in the absence of any contravening evidence, the Committee finds that Petitioner's proposed project is the "result of a competitive solicitation or negotiation" within the meaning of PRC, § 25540.6(a)(1).

Based on the totality of the record, we make the following findings and conclusions:

- 1) Calpine Corporation and Bechtel Enterprises, Inc. (Petitioner) filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the *ER 94* Addendum, *ER 96*, and the *Blythe Energy* Decision, and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.
- 2) Petitioner proposes to construct a natural gas-fired combined cycle powerplant, nominally rated at 880 to 950 megawatts (MW). The project will consist of three combustion gas turbine (CGT) generators; three heat recovery steam generators (HRSG), a single condensing steam turbine generator, a cooling tower, and auxiliary equipment, which are typical of natural gas-fired powerplants.
- 3) Calpine Corporation and Bechtel Enterprises each own 50% of the proposed project known as the Delta Energy Center. Bechtel will construct the project; Calpine, a California company headquartered in San Jose, will operate the facility and market the power produced by the project. Calpine presently owns an interest in 26 power generation facilities and geothermal steam fields in the U.S., with an aggregate capacity of 3,097 MW. Calpine is also in the process of constructing two gas-fired projects with a total capacity of 434 MW, and developing seven projects, including the Delta Energy Center, with a total capacity of 3,320 MW. Bechtel Enterprises, an affiliate of the Bechtel Group, has developed over 26 power generation projects around the world, totaling 7,120 MW. Since 1941, the Bechtel Group has built over 450 powerplants with a combined capacity of 250,000 MW.
- 4) Calpine's joint venture with Bechtel includes an agreement to develop merchant powerplants, including the Delta Energy Center, in Northern California to primarily serve the San Francisco Bay Area.
- 5) The Delta Energy Center will be located in Contra Costa County, in the city of Pittsburg, on a 20-acre site owned by Dow Chemical and leased to Petitioner.

- 6) Petitioner chose the site in connection with Dow Chemical's solicitation for the sale of its existing 70 MW powerplant, its natural gas pipeline systems, and for the development of a new merchant powerplant on Dow Chemical property. Calpine, the successful bidder, joined with Bechtel to develop the proposed project which will function as a cogenerator to provide 200,000 pounds per hour of steam and up to 18 MW of electricity to the Dow Chemical complex. Although the project will function as a cogeneration facility in relation to Dow, the project does not meet the definition of "cogeneration" under PRC, § 25134, and is deemed a merchant powerplant facility.
- 7) Petitioner's site selection criteria included the location in Northern California, proximity to Dow; industrial zoning; proximity to the Delta Diablo wastewater treatment plant; distance of one mile from the nearest residential area; and accessibility to natural gas pipeline systems.
- 8) The project is designed as a baseload plant with start-up and load following capability that will support participation in the day-ahead and hourly energy markets. Petitioner does not anticipate congestion related issues associated with the project. PG&E will provide an Interconnection Study for review by the California Independent System Operator (ISO) to determine whether transmission upgrades are necessary. Petitioner expects to participate in the ancillary services market as identified by the ISO.
- 9) The development of Delta Energy Center as a merchant project does not put ratepayers at risk. Petitioner is not affiliated with investor-owned utilities; and, therefore, is not eligible for ratepayer support mechanisms from any source.
- 10) The proposed powerplant project is a market-based response to the creation of the California Power Exchange (PX); in addition to the electricity delivered to Dow Chemical, the project will sell the balance of its output through the PX, in the bilateral power sales market including municipal utilities and irrigation districts, other power exchanges, and the Western Systems Power Pool.
- 11) Petitioner has access to the PX market through existing energy-marketing firms such as the Automated Power Exchange, which is registered with the PX; or, in the alternative, Petitioner may sell power directly to the PX upon registration as a participant.

We conclude, therefore, that Petitioner's proposed natural gas-fired powerplant project is the "result of competitive solicitation or negotiation" for the sale of its electric power. Under these circumstances, and in light of the findings reached above and factors discussed elsewhere in this Decision, and based on the precedent established in the *Blythe Energy* Decision, the Delta Energy Center qualifies for an exemption from the Notice of Intention as set forth in Public Resources Code

section 25540.6(a)(1).

Dated: _____

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

ROBERT A. LAURIE
Commissioner and Presiding Member
Energy Facility Siting Committee

DAVID A. ROHY, Ph.D.
Vice Chair and Associate Member
Energy Facility Siting Committee

APPENDIX A

EVIDENCE OF RECORD

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of)	
)	Docket No. 98-SIT-5
Calpine Corporation and Bechtel)	
Enterprises, Inc. (Delta Energy Center))	COMMITTEE PROPOSED
Petition for Jurisdictional)	DECISION
Determination)	
_____)	

EVIDENCE OF RECORD

<u>Date</u>	<u>Document</u>
September 17, 1998	Petition for Jurisdictional Determination filed by Delta Energy Center, LLC; Exhibit A (Affidavit of Lynn Kerby); Exhibit B (Letter from City of Anaheim re potential power purchase); Exhibit C (Letter from SMUD re potential power purchase).
October 23, 1998	Amendment to Petition for Jurisdictional Determination.
November 3, 1998	Energy Commission Staff Statement filed by Energy Commission Staff.
November 5, 1998	Response to Question 4, filed by Delta Energy Center as submitted by Counsel for Petitioner.
November 5, 1998	Responses to Questions 1-3 and 5-12, filed by Delta Energy Center, LLC; Written testimony by Lynn Kerby filed under penalty of perjury; Affidavit by Lynn Kerby; Resume of Lynn Kerby; Exhibit A (Letter from Dow Chemical); Exhibit B (Map of Site).

APPENDIX B

PROOF OF SERVICE LIST